IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 17/03/2004

CORAM

THE HONOURABLE MR.JUSTICE M.CHOCKALINGAM

SECOND APPEAL No.1264 of 1993

1. Nalluswami (died)
2. N.Palaniswamy
3. Sakuntala
4. Chandra
5. Dhanalakshmi
6. Gnanambal
(Appellants 2 to 6 are brought on
record as LRs of the deceased
1st appellant vide CMP 17503/96) .. Appellants

-Vs-

1. Kamsala
2. Minor Sampurani
minor rep. by mother and guardian
Kamsala 1st respondent. .. Respondents

This second appeal is preferred under Sec.100 of the Code of Civil Procedure against the judgment and decree of the District Judge, Salem, made in A.S.No.218 of 1991 dated 28.2.1992 reversing the judgment and decree of the Subordinate Judge, Sankari made in O.S.No.262 of 198 5 dated 12.11.1990.

!For Appellants : Mr.R.Gunasekaran

^For Respondents : Mr.P.Jagadeesan

:JUDGMENT
Aggrieved over the judgment of the learned District Judge, Salem, made in A.S.No.218/91 wherein the judgment of the trial Court in a suit for partition was reversed by granting a preliminary decree in favour of the plaintiffs. the first defendant has brought forth this second appeal.
2. Necessary facts for the disposal of this appeal are as follows:
The suit properties belonged to the joint family consisting of the first defendant and his brother Ramasamy by survivorship. The said brothers continued as members of the coparcenary, and they were enjoying the properties without making a division. The wife of Ramasamy namely Chinnathangam died on 30.8.1978, after giving birth to a female child by name Rajeswari, the second defendant. For the purpose of convenient enjoyment, the properties were enjoyed by the brothers. The first plaintiff first married one Rasamuthu, and it ended in a divorce as per the custom of their community. The said factum

of divorce was also reduced into writing in the form of Muchalika. The said Ramasamy, after the death of his first wife, married the first plaintiff, according to the caste and customs, and they were living together. The second plaintiff was born on 8.8.1981. The husband of the first plaintiff died on 17.3.1982 intestate, leaving behind the plaintiffs and the second defendant as the heirs. Since Ramasamy and his brother were entitled to each + share in the properties, each of the plaintiffs by operation of law was entitled to 1/6th share in the properties. Since amicable division was not possible, there arose a necessity for filing the suit for partition of the properties.

3. The suit was resisted by the defendants stating that the alleged marriage of the brother of the first defendant Ramasamy with the first plaintiff is false; that the second plaintiff was not born out of the said wedlock, and thus, the first plaintiff as the wife and the second plaintiff as the daughter of Ramasamy were not entitled to partition in the properties.

4. The trial Court framed the necessary issues, tried the suit and dismissed the same. Aggrieved, the plaintiffs took it on appeal, wherein the judgment of the trial Court was reversed by the first appellate Court, and a preliminary decree was granted in favour of the plaintiff. Hence, the first defendant has brought forth this second appeal.

5. At the time of admission, the following substantial questions of law was formulated by this Court:

"Whether the judgment of the lower appellate Court is vitiated by its failure to consider the entire evidence on record and apply the correct principles of law?"

6. This Court paid its full attention on the rival submissions made and had a thorough scrutiny of the evidence available.

7. As could be seen above, the plaintiffs sought a division in the suit properties alleging that it was jointly owned by one Ramasamy, the husband of the first plaintiff and father of the second plaintiff, and his brother Nallusamy, the first defendant; that on the death of his first wife, the said Ramasamy married the first plaintiff as per the custom, and they were living together; th at out of the said wedlock, the second plaintiff was born; that the husband of the first plaintiff died intestate, and thus, by operation of law, the plaintiffs are entitled to 1/6th share each in the properties, and hence, they sought for division. What was all contended by the defendants before the Courts below and equally here also is that the alleged marriage between the first plaintiff and the said Ramasamy, the brother of the first defendant, was false and also not proved, and hence, the request of the plaintiffs for division was to be rejected. The first appellate Court has discussed this question in extenso and has held that there was a valid marriage between the first plaintiff and Ramasamy as per the custom prevailed in the said community. In order to prove the factum of marriage, the first plaintiff has examined herself as P. W.1, her mother as P.W.2 and a few witnesses, who have clearly spoken to the factum of marriage. The contention that was raised by the appellant's side that no custom prevailed in the community of the parties for the conduct of the second marriage was rightly rejected by the first appellate Court. It is not the case of the plaintiffs that the first plaintiff married Ramasamy during the force of the marriage between the said Ramasamy and his first wife; but, only on the death of the first wife, he married the first plaintiff. Insofar as the customary divorce between the first plaintiff and her first husband, sufficient evidence was

also let in before the trial Court. The first appellate Court has discussed the evidence and has taken a correct view.

8. Apart from the above, the plaintiffs have also proved that they were actually in possession of the properties and have also filed number of kist receipts to prove the same. Had it not been true that the first plaintiff was not in association with the said Ramasamy, she would not have been put in possession of the property and also in enjoyment of the same. The lower appellate Court has rightly pointed out that the presumption has to be drawn in the case, since the first plaintiff and the said Ramasamy were living together for a long time, and the other evidence would also corroborate their relationship between both as husband and wife. This Court is unable to notice any reason to interfere in the judgment of the first appellate Court.

9. Therefore, this second appeal fails, and the same is dismissed, confirming the judgment and decree of the first appellate Court and leaving the parties to bear their costs.

Index: yes
Internet: yes

To:

1. The District Judge
Salem
2. The Subordinate Judge
Sankari

3. The Record Keeper, V.R. Section
High Court, Madras.

nsv/

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